

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

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|---|---|--------------------------------|
| 10302 MADISON AVE, LLC. |) | CASE NO. CV 12 787831 |
| |) | |
| Plaintiff |) | JUDGE JOHN P. O'DONNELL |
| |) | |
| vs. |) | |
| |) | |
| J.L.E.C., INC., dba J. LOMBARDO ELECTRIC, INC. |) | <u>JOURNAL ENTRY</u> |
| |) | |
| Defendant/Third-party Plaintiff |) | |
| |) | |
| vs. |) | |
| |) | |
| CLEVELAND HEATED STORAGE, LLC, <i>et al.</i> |) | |
| |) | |
| Third-party defendants |) | |

John P. O'Donnell, J.:

STATEMENT OF THE CASE

By its complaint, filed July 25, 2012, plaintiff 10302 Madison Ave., LLC seeks 1) a declaratory judgment that a mechanic's lien filed against the plaintiff's property by defendant J.L.E.C., Inc., dba J. Lombardo Electric, Inc. is invalid and 2) damages for slander of title. Lombardo responded with a counterclaim against Madison for unjust enrichment and, on October 9, 2012, also filed a third-party complaint against Cleveland Heated Storage, LLC and Phillip J. Cable. The third-party complaint alleges the breach of a contract for Lombardo to perform electrical work at the building CHS leased from Madison. Cable is included as a defendant on the third-party complaint because he personally guaranteed the contract.

The third-party complaint against Cable only is stayed by his personal bankruptcy filing. CHS never entered an appearance and a default judgment on the third-party complaint was entered against it on December 21, 2012.

Cross-motions for summary judgment are now pending and fully briefed. Madison argues for summary judgment in its favor on both of its claims and the counterclaim for unjust enrichment. Lombardo has moved only for summary judgment in its favor on the counterclaim. This entry follows.

STATEMENT OF FACTS

Plaintiff Madison owns the property at 10302 Madison Avenue, Cleveland. In November, 2011, Madison leased the property to CHS, which planned to use the property as indoor storage for boats and cars. The lease covered an initial period of five years. Besides requiring CHS to pay monthly rent, the lease also obligated CHS to pay for improvements to the property's electrical systems. Considering that CHS would be spending money on the improvements, the monthly rent was less than it otherwise would have been. CHS retained Lombardo to do the electrical work. Lombardo had no contract with Madison. After Lombardo finished the work, CHS did not pay the \$49,814.00 bill. Therefore, on January 30, 2012, Lombardo filed with the office of the fiscal officer of Cuyahoga County a mechanic's lien pursuant to Ohio Revised Code section 1311.06.

In the meantime, CHS also defaulted on the lease and Madison filed for eviction in the Cleveland Municipal Court's housing division.

The eviction case was resolved by a consent judgment entry dated May 1, 2012. The agreement allowed CHS to retain possession of the premises by making certain payments, including Lombardo's bill. The consent entry further provided that if CHS did not make the

payments then Madison was “entitled to immediately obtain possession of the premises.” Yet again, CHS defaulted. Madison terminated the lease and took possession of the property.

LAW AND ANALYSIS

R.C. §2721.03 allows any person whose rights are affected by a statute to have any question of validity arising under that statute decided through a declaratory judgment lawsuit. Lombardo’s mechanic’s lien was filed pursuant to R.C. 1311.01 *et seq.* The validity of a mechanic’s lien is an appropriate subject for declaratory judgment. See, e.g., *John R. Hess, Inc. v. Brecksville Asphalt Paving Co.*, 8th Dist. No. 43430, 1981 Ohio App. Lexis 10521 (Nov. 5, 1981).

In Ohio, a contractor performing any improvements to real estate has a lien upon the real estate. R.C. 1311.02. However, the lien is only to the extent of the interest in the real estate held by the party who retained the contractor. *Id.*

Two property interests are implicated in this case: Madison’s fee simple interest and CHS’s leasehold. Under Ohio law, a fee simple is the highest right, title and interest that one can have in land; it is the full and absolute estate in all that can be granted. *Masheter v. Diver*, 20 Ohio St. 2d 74, 78 (1969). A leasehold, on the other hand, is an estate in land created by contract (a lease) giving the lessee a right of possession. Although a leasehold, depending on the terms of the lease, can allow the lessee to act essentially as an owner it does not permit the lessee to encumber any interest greater than the leasehold. Moreover, a leasehold exists only for the stated term of the lease. When the lease ends, so does the leasehold.

In this case, Lombardo’s lien could attach only to CHS’s leasehold. Although the lease is not in evidence, there is no genuine issue of material fact that it has terminated and CHS’s interest in the property no longer exists. Because the only interest in the property to which

Lombardo's lien could attach no longer exists, the mechanic's lien itself is nugatory and must be removed from the county's records. Reaching this conclusion does not require a consideration of whether the mechanic's lien was valid in the first place: if it was, it isn't anymore, and if it wasn't valid upon filing it certainly isn't now that the leasehold doesn't exist.

A consideration of whether the lien was valid when filed, although useful, is also not necessary to decide Madison's motion for summary judgment on the slander of title claim.

There is no question that Lombardo wasn't paid and had the right to lien CHS's leasehold interest. In order to perfect a mechanic's lien a contractor must file an affidavit with the county recorder that describes the work done and the amount due. R.C. 1311.06(A).

R.C. 1311.06(C) prescribes an acceptable form for the affidavit. Lombardo duplicated the language of that form and filed an affidavit including alternative bases for the lien that did not allow a reader to figure out whether the lien was on the leasehold or fee interest. The affidavit reads as follows, with language italicized by the court that, if excised, would have made it perfectly clear that Lombardo did not claim a lien on Madison's fee interest:

JOHN S. LOMBARDO, President of J.L.E.C., INC., dba J. LOMBARDO ELECTRIC, INC., the lien claimant, whose address is 1480 W. Bagley Road, Berea, Ohio 44017, being first duly sworn, says that the lien claimant furnished certain material or performed certain labor or work in the furtherance of improvements located on *or removed to* the land hereinafter described, in pursuance of a certain contract with CLEVELAND HEATED STORAGE, LLC/Mr. Phil Cable, the *owner, part owner, lessee, original contractor, subcontractor, or other person, as the case may be*, whose address is 10302 Madison Avenue, Cleveland, Ohio 44102. The first of the labor or work was performed or material was furnished on or about October 30, 2011. The last of the labor or work was performed or material was furnished on January 18, 2012, and there is justly and truly due J.L.E.C., INC., dba J. LOMBARDO ELECTRIC, INC., the lien claimant, therefore from CLEVELAND HEATED STORAGE, LLC/Mr. Phil Cable, the *owner, part owner, lessee, original contractor, subcontractor, or other person, as the case may be*, over and above all legal setoffs, the sum of Forty-Nine Thousand Eight Hundred Fourteen Dollars (\$49,814.00), for which amount J.L.E.C., INC. dba J.

LOMBARDO ELECTRIC, INC., the lien claimant, claims a lien on the *land, building or leasehold*, of which 10302 MADISON AVENUE, LLC, an Ohio limited liability company, is the *owner, part owner, or lessee, as the case may be*, which property is described as follows: Known as 10302 Madison Avenue, Cleveland, Ohio 44102.

Slander of title to real estate is a tort action against one who falsely and maliciously defames title to property and causes some special pecuniary damages or loss. *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶11. Generally, slander of title to real estate involves the wrongful recording of an unfounded claim, such as a mechanic's lien, to the property of another. *Id.* To prevail, a claimant must prove: (1) there was a publication of a defamatory statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages. *Id.*

Genuine issues of material fact on most of these elements exist that preclude summary judgment for Madison. For example, and assuming Lombardo's affidavit includes a false statement that it had a lien on Madison's interest in the property, it is not obvious that the statement is defamatory. To constitute defamation a statement must injure a person's reputation. Construing the available evidence most strongly in Lombardo's favor leaves the possibility that the mere filing of a lien does not injure a property owner's reputation. As another example, there is a genuine issue of material fact about whether Lombardo acted with malice. Construing the evidence most strongly in Lombardo's favor, the fact that the affiant followed a statutory form, albeit without tailoring it to the circumstances, suggests there was no malice.

There are also genuine issues of material fact preventing summary judgment for either party on the counterclaim for unjust enrichment. The elements of an unjust enrichment claim

are: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Lycan v. City of Cleveland*, 8th Dist. No. 94353, 2010-Ohio-6021, ¶7. There appears to be little doubt that Madison has received a benefit of which it is aware in the form of an improved electrical system. However, it is not at all clear that an injustice will happen if Madison is not forced to pay Lombardo. The defendant entered into a contract with CHS, not Madison. If Lombardo wanted to ensure payment by Madison if CHS defaulted then Lombardo could have insisted that Madison be a party to the contract. A fact finder can reasonably conclude that Lombardo's conscious failure to take that precaution exposed it to the eventuality that materialized – a default by CHS, the only party contractually liable to Lombardo – and that it would not be unjust to suffer the consequence of its decision not to include the property owner in the contract.

At the same time, Madison has building improvements it didn't pay for. A finder of fact could conclude that Madison got more value from CHS than it gave and that the excess was at Lombardo's expense so that it would be unjust for Madison not to pay some or all of Lombardo's bill.

CONCLUSION

The court grants Madison’s motion for summary judgment in its favor on the cause of action for declaratory judgment and declares that the lien filed by Lombardo on January 30, 2012 as instrument number 201201300006 is invalid and unenforceable. Accordingly, Lombardo is ordered to forthwith file with the office of the fiscal officer of Cuyahoga County a release of that lien.

The court denies the rest of Madison’s motion for summary judgment and Lombardo’s motion for summary judgment on its counterclaim.

IT IS SO ORDERED:

Judge John P. O’Donnell

Date: _____

SERVICE

A copy of this journal entry was sent by email, this 9th day of May 2013, to the following:

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Judge John P. O’Donnell